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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1961

No. 872

ST. MARY PARISH SCHOOL BOARD,
Petitioner,

versus

TERREBONNE PARISH SCHOOL BOARD,
Respondent.

ORIGINAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED.

I. (a) Should this Court grant a writ of certiorari to review a decision of the Supreme Court of Louisiana which gave effect to an admittedly constitutional provision of a state statute where the United States District

Court, in the case of *Bush v. Orleans Parish School Board*; 188 F. Supp. 916, 366 U. S. 212, 81 S. Ct. 1091, 6 L. Ed. (2d) 239, addressed itself to an entirely different provision of that state statute and declared it unconstitutional but did not declare upon the severability of the state statute?

(b) No federal question or issue was presented to the Supreme Court of Louisiana and no federal question was necessary to the determination of the case.

II. **Alternatively,** if the Court should grant the writ, it should review the question raised by respondent in the state courts that Article 19, Section 26, Appendix 1, of the Constitution of the State of Louisiana is in violation of the due process and equal protection clauses of the Constitution of the United States, insofar as it would deny respondent the right to a judicial determination of this controversy involving revenues derived from a Section 16 dedicated by Acts of Congress for the support of public schools **within the township.**

I.

ARGUMENT FOR DENIAL OF THE WRIT.

(a)

Petitioner, St. Mary Parish School Board, applies to this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Louisiana, entered in the above case on December 29, 1961, rehearing denied February 2, 1962. Petitioner contends that the Supreme Court of the State of Louisiana could not give effect to an unoffending and obviously constitutional pro-

vision of Act 25 of 1960, Appendix 2, because it says the United States District Court in the case of *Bush v. Orleans Parish School Board, supra*, declared the whole of the statute unconstitutional.

The answer to its contention can be found in an examination of Act 25 of 1960, the decision of the Louisiana Supreme Court, and the *Bush* case.

Act 25 of the First Extraordinary Session of the Louisiana Legislature of 1960 may, for our purposes, be divided into two parts:

> **Section 1,** which has the effect of reinstating parish school boards as bodies corporate with the power to sue and be sued;
>
> **Section 2,** which repeals the law relative to the nomination and election of the Orleans Parish School Board.

The Supreme Court of Louisiana found that the United States District Court in *Bush v. Orleans Parish School Board, supra*, struck as unconstitutional Section 2 of Act 25 of the First Extraordinary Session of 1960 but that Section 1 of Act 25 of 1960 was not the subject of the demand in that case and was not declared unconstitutional. For convenience the pertinent portion of the opinion of the Supreme Court of Louisiana on this point is quoted as follows:

> "Thus it is manifest that the Federal Court was interested only in preserving the law establishing the Orleans Parish School Board, and providing for the election of its members for stated terms,

and it struck as unconstitutional the repeal of that law (R. S. 17:121) by Section 2 of Act 25 of the First Extraordinary Session of 1960. Its decree, when viewed in the light of the statements in the opinion and the appendix, can be construed as going no further. **Assuredly, it cannot be seriously contended that R. S. 17:51, as reenacted by Section 1 of Act 25 of 1960, is violative of the Federal Constitution or that its provisions are calculated to deprive Negro children of their constitutional rights."** (Emphasis supplied.)

To further emphasize and point up the fact that in the *Bush* case the United States District Court was only concerned with Section 2 of Act 25 of 1960, we find that "Appendix B" of the decision reads as follows:

> "Act No. 25. Repeals La. R. S. 17:121 relating to the election and qualifications of members of the Orleans Parish School Board."

It is obvious that in the *Bush* case the United States District Court was concerned only with the unconstitutionality of Section 2 of Act 25 of 1960, which dealt with the election and qualification of the Orleans Parish School Board and consequently the Court addressed itself solely to that portion of the statute. No reference was made to Section 1 of Act 25 of 1960 and, certainly, by no stretch of the imagination could this section, which made parish school boards bodies corporate with power to sue and be sued, be unconstitutional. Indeed, Section 1 facilitates judicial review and the settlement of legitimate controversy.

Petitioner, St. Mary Parish School Board, seeks to broaden the effect of the *Bush* case so as to strike with unconstitutionality a completely innocuous and unobjectionable provision of a state statute. Petitioner attempts to invoke the Supremacy Clause of the Constitution of the United States and incite this Court to the defense and protection of that clause, when, forsooth, its application is neither challenged nor an issue here. In support of its thesis, petitioner cites cases to the effect that the state courts cannot violate the supreme law of the land and that they must conform to the decisions of this Court. This is not questioned, nor did the Supreme Court of Louisiana, in any way, challenge the Supremacy Clause or evade the decree of this Court.

At the risk of over simplification, we submit that the Supreme Court of Louisiana only performed a function approved by the United States Supreme Court, that is, it determined that Section 1 of Act 25 of 1960 was, in effect, severable from Section 2 thereof, and that Section 1 should be given legal effect as the Legislature would have intended that provision to stand even though Section 2 was held to be unconstitutional. Its duty to do so is embedded in the jurisprudence of this Court which has repeatedly held that the state supreme courts should determine the severability of a state statute and the intent of the Legislature so as to give effect to that part which is good as distinguished from that part which is bad. This pronouncement is the gravamen of the decision by this Court in the case of *Dorchy v. State of Kansas*, 264 U. S. 286, 44 S. Ct. 323, 68 L. Ed. 686 (1924), where this Court in considering the constitutionality of a state statute declared, through Mr. Justice Brandies, that:

> "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court."

A subsequent, and more specific application of that doctrine in the context of the instant situation is found in *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S. 552, 45 S. Ct. 441, 69 L. Ed. 785 (1925), wherein this Court had, on a previous occasion, voided a Kansas wage-fixing statute as being violative of the Fourteenth Amendment, and had remanded the cause for further proceedings "not inconsistent with" its decree.

On remand, the Kansas Court, among other things, held that the thrust of this Court's initial decree was directed solely at the wage-fixing sections, that working-hour features of the Act were separable from the wage-fixing provisions, and proceeded to hold the former provisions valid,—this against the relator's contention that this Court's earlier determination had adjudged the invalidity of the entire Act, and had foreclosed any further state action under the statute. In upholding the state Court's power to pass upon the separability of the pertinent provisions, this Court declared:

> "In the proceedings which followed the receipt of the mandate, the state court held that the other parts of the act were separable from those permitting the fixing of wages and also pronounced them constitutional. As the question of separability was a state question, the decision of that court

thereon is conclusive here. Dorchy v. Kansas, 264 U. S. 286, 44 S. Ct. 323, 68 L. Ed. 686; Hallanan v. Eureka Pipe Line Co., 261 U. S. 393, 397, 43 S. Ct. 414, 67 L. Ed. 715. The decision on the constitutional question is all that we can review."

As to the impact of this Court's previous declaration upon the lack of constitutionality of the Kansas statute, Mr. Justice Van Devanter, the organ of the Court, cited *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, 553, 24 S. Ct. 538, 539, 48 L. Ed. 788, for the proposition that:

". . . A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

This admonition, we submit is fully applicable to and in perfect accord with the determination by the Supreme Court of Louisiana as to the effect of the *Bush* decision on Section 1 of Act 25, *supra*. As a matter of fact, the context in which the *Wolff* case is framed is remarkably similar to the issues here presented, and, we submit, is controlling thereof.

It is well established that the unconstitutionality of one provision of a statute does not render it invalid as a whole where such provision may be stricken out without altering the meaning, purpose or effect of those remaining. *Board of Supervisors of the County of Albany v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Watson, et al., v. Buck*, 313 U. S. 387, 61 S. Ct. 962, 85 L. Ed. 1416 (1941); *McMillan Co. v. Johnson*, 269 F. 28.

It was held in the case of *Izaac Drug Stores v. Lee*, 11 F. Supp. 672 (1935):

> ". . . we are not impressed with the contention of plaintiffs . . . but rather hold to the rule that where a part of a statute is in conflict with a constitutional provision, a court has no authority to declare the remainder void also, if, where the unconstitutional portion is stricken out, that which remains is complete in itself."

This Court, in *Dahnke-Walker Milling Co. v. Bondurant*, 42 S. Ct. 106, 257 U. S. 282, 66 L. Ed. 239, has even said that:

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another."

The declaration in the case of *Dahnke-Walker Milling Co. v. Bondurant*, *supra*, takes on, perhaps, added significance and meaning when applied to the facts before us. Given a set of facts where Act 25 of 1960 would operate as a denial of fundamental rights guaranteed by the Constitution, it would be unconstitutional, but when applied to a wholly different set of facts where no such rights are at issue then, certainly, at the very least, the innocuous, unobjectional provisions of that statute should be given effect.

Thus we see that not only every effort should be made to sustain a perfectly constitutional provision of a statute but it even appears that it is the Court's duty to do so where it is apparent that the Legislature would have intended to enact that provision, irrespective of the

unconstitutional portion. The Supreme Court of Louisiana has found that the Legislature of Louisiana so intended.

Counsel for petitioner contends that the Supreme Court of Louisiana attempted to interpret the decision in the *Bush* case, *supra*. We submit that no question of interpretation of the decision in the *Bush* case was involved or necessary, but a mere examination of the decision discloses that it was concerned only with the unconstitutionality of Section 2.

It is true that the U. S. District Court in the *Bush* case did not determine the severability of Section 1 of Act 25 of 1960, but we submit that it was not obliged to do so. It may even have neglected to do so. In any event, this Court has held that it is appropriate to leave the determination of the question of severability and interpretation of a state statute, as to the remaining constitutional portion thereof, to the state Court. *Dorchy v. State of Kansas, supra; Chas. Wolff Packing Co. v. Court of Industrial Relations, supra.*

(b)

The decision of the Supreme Court of Louisiana was founded completely on an interpretation of the statutes and constitution of the State of Louisiana, and there was no issue of conflict between the Louisiana statutes and rights guaranteed by the United States Constitution. The basis for the decision was wholly dependent upon state law.

The jurisprudence of this Court is unequivocally to the effect that it must appear affirmatively that a

federal question was presented to the state Court and that a decision of a federal question was necessary to the determination of the cause. This rule of law was succinctly stated in *Southwestern Bell Telephone Co. v. State of Oklahoma, et al.*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751 (——), wherein the Court said:

> "We have repeatedly held that it is essential to the jurisdiction of this court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment rendered could not have been given without deciding it."

To the same effect are the cases of *Geo. O. Richardson Machinery Co. v. Scott*, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497 (1928); *Honeyman v. Hanan*, 300 U. S. 14, 57 S. Ct. 350, 81 L. Ed. 476 (1937); *Williams v. Kaiser*, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398 (1945).

* * * * * *

For the foregoing reasons respondent, Terrebonne Parish School Board, feels that the application for a writ of certiorari should be denied.

II.

ALTERNATIVE RELIEF IF THE COURT SHOULD GRANT THE WRIT.

In the **alternative**, if the Court should grant the writ, respondent respectfully submits that this Court

should review the question raised by respondent in the state courts to the effect that Article 19, Section 26, of the Constitution of the State of Louisiana, Appendix 1, is in violation of the due process and equal protection clauses (Amendment V., Appendix 3); (Amendment XIV, Appendix 4) of the Constitution of the United States, insofar as it would deny respondent the right to a judicial determination of this controversy, involving revenues derived from a Section 16 dedicated by the Acts of Congress (Act of April 21, 1806, Ninth Congress, First Session, 1 Stat. 391, Appendix 5; and Act of March 3, 1811, Eleventh Congress, Third Session, 3 Stat. 662, Appendix 6) for the support of public schools **within the township**. Article 12, Section 18, of the Louisiana Constitution, Appendix 7, insures that the revenues derived from a Section 16 would be dedicated to the support of schools for the inhabitants residing in such township. To permit a school board to wrongfully appropriate to its own use funds, a portion of which belong to another school board, all under some theory that the matter cannot be judicially determined and consequently there is no forum for relief, would impair the dedication in trust of the proceeds from the 16th Sections for the benefit of the townships in which they lie, all encompassed within the Acts of Congress and further sanctified by Article 12, Section 18, of the Louisiana Constitution, under which respondent is here proceeding to assert its right. Article 19, Section 26, of the Constitution of the State of Louisiana, as amended, cannot be interpreted so as to clothe the parish school boards with sovereign immunity in the instant case and, if it should be, then such amendment would be in violation of the due process and equal protection clauses of the Constitution of the United States.

It is clear that the federal statutes hereinabove cited were tailored to protect and perpetuate rights flowing from prior federal sovereignty over Louisiana, rights which in effect were dedicated to the support of public schools within a township, such rights being essentially the same rights involved here. Article 12, Section 18, of the Constitution of the State of Louisiana merely re-emphasizes and lends the support of state sovereignty to rights which had previously been clearly set forth by the Congress. To the extent that St. Mary Parish School Board retains revenue which belongs to Terrebonne Parish School Board and derived from the Sixteenth Section involved here and uses same for support of public schools within only a portion of the township in which that section lies, to that same extent St. Mary has infringed upon federal and state granted rights. St. Mary Parish School Board, in a word, is acting wrongfully; it acts in violation of the federal and state mandates, and this Court has repeatedly held in a long line of cases, commencing with *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 451, 453, 52 L. Ed. 714, that St. Mary can find no refuge from the consequences of its acts, even behind the sovereignty of the State of Louisiana as embodied in Article 19, Section 26, of the Constitution of the State of Louisiana.

The jurisprudence of the State of Louisiana is wholly in accord with this doctrine. In *Carso v. Board of Liquidation of State Debt*, 205 La. 368, 17 So. (2d) 358 (1944), the Supreme Court of Louisiana sustained an action against a state agency and said:

> ". . . But it is begging the question to argue that a suit to prevent a state official or state agency

> from disposing of funds of the State in violation of the Constitution or of a law of the State is a suit against the State. **Such a suit is not a suit against the state,** in the meaning of Section 35 of Article III of the Constitution, **if the** defendant, state official or **state agency, is proceeding in violation of law;** and that question of course appertains to the merits of the case." (Emphasis supplied.)

This doctrine was re-emphasized in Louisiana as recently as 1957, when in *Orleans Parish School Board v. Bush*, 242 F. (2d) 156 (Ct. of App., 5th Circuit), it was held:

> "If in fact the laws under which the board here purports to act are invalid, then the board is acting without authority from the State and the State is in nowise involved."

It follows, therefore, if a school board or state agency acts wrongfully in violation of the law it cannot claim an immunity which it might otherwise have.

We cannot help but observe that petitioner now seeks to do in this instance precisely what the Court in *Bush v. Orleans Parish School Board, supra*, refused to permit the State of Louisiana itself to do, namely, to deny, indeed, to flaunt its illegal acts in defiance of federally protected or guaranteed rights. In the *Bush* case, the Court struck down Section 2 of Act 25 of the Louisiana Legislature in order to frustrate a similar attempt.

To extend to St. Mary Parish School Board an all-inclusive immunity from suit regardless of its violation of a Louisiana Constitutional mandate and federal protective rights, as sought by petitioner in this case, would be giving to it unlimited license violative of the rights of the people without benefit of judicial review.

CONCLUSION.

For the reasons set forth above, and the authorities upon which those reasons are predicated, it is accordingly submitted that the application for writ of certiorari by the St. Mary Parish School Board should be denied; and

Alternatively, if the Court should grant the writ, respondent prays that it review the question raised by it in the state courts that Article 19, Section 26, of the Constitution of the State of Louisiana is in violation of the due process and equal protection clauses of the Constitution of the United States; for costs; and for full and general relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that the petitioner, St. Mary Parish School Board, has been properly served, in conformity with Rule 33 of the United States Supreme Court, with a copy of the foregoing brief in opposition to the granting of a writ of certiorari, by depositing same in a United States Post Office, correctly addressed to petitioner's counsel of record at his post-office address with first-class postage prepaid; and that I execute this certificate as a member of the bar of the United States Supreme Court.

Houma, Louisiana, this May . . , 1962.

CLAUDE B. DUVAL

APPENDIX 1.

PERTINENT PORTION OF ARTICLE 19, SECTION 26, OF THE CONSTITUTION OF LOUISIANA: AS ADDED BY LOUISIANA ACT NO. 613 of 1956; ADOPTED NOVEMBER 6, 1956.

"The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:

"* * * (7) The parish school boards of each of the parishes of the State of Louisiana. * * *

"The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, (however heretofore given), is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in this section. * * * There is expressly excepted from the foregoing, suits for the enforcement of contracts entered into by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35, of Article III of this Constitution.

"This Section shall be self-operative and shall supersede any other portion of this Constitution or any statutes or regulations in conflict herewith."

APPENDIX 2.

LOUISIANA ACT NO. 25 OF THE FIRST EXTRAORDINARY SESSION OF 1960

"Be it enacted by the Legislature of Louisiana:

"Section 1. That Section 51 of Title 17 of the 1950 Louisiana Revised Statutes, relative to Parish School Boards, be amended and re-enacted so as to read as follows:

"Section 51. Parish boards as bodies corporate; officers upon whom service may be made.

"There shall be a parish school board for each of the parishes, and the Legislature shall make provision for the creation and election of a School Board for the Parish of Orleans, and these several parish school boards are constituted bodies corporate with the power to sue and be sued under the name and style (Name of Parish) Parish School Board. Citation shall be served on the president of the board and in his absence on the vice-president.

"Section 2. That Section 121 of Title 17 of the 1950 Louisiana Revised Statutes relative to the nomination and election of members of the Orleans Parish School Board, qualifications, compensation, and vacancies, be and the same is hereby repealed in its entirety.

"Section 3. The necessity for the immediate passage of this Act having been certified by the Governor to

the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

"Approved by the Governor: November 8, 1960, at 7:15 P. M."

APPENDIX 3.

AMENDMENT (V.) TO THE CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX 4.

PERTINENT PORTION OF AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX 5.

PERTINENT PORTION OF ACT OF APRIL 21, 1806. NINTH CONGRESS, FIRST SESSION. 1 STAT. 391

"Sec. 11. And be it further enacted, That the President of the United States be, and he, is hereby authorized, whenever he shall think it proper, to direct so much of the public lands lying in the western district of the territory of Orleans, as shall have been surveyed in conformity with the provisions of the act to which this act is a supplement, to be offered for sale. All such land shall, with the exception of the section 'number sixteen,' which shall be reserved in each township for the support of schools within the same: . . ."

APPENDIX 6.

PERTINENT PORTION OF ACT OF MARCH 3, 1811. ELEVENTH CONGRESS, THIRD SESSION. 3 STAT. 662

"SEC. 10. And be it further enacted, That the President of the United States be, and he is hereby authorized, whenever he shall think proper, to direct so much of the public lands lying in the territory of Louisiana, as shall have been surveyed in conformity with the eighth section of this act, to be offered for sale. All such lands shall, with the exception of the section 'number sixteen,' which shall be reserved in each township for the support of schools within the same . . ."

APPENDIX 7.

Article 12, Section 18 of the Constitution of the State of Louisiana

"Section 18. Where Sixteenth Section or Indemnity lands granted by Congress for public school purposes have been erroneously sold by the State, or paid by the State as fees for services rendered, such deficiencies shall be properly adjusted, as provided by the Constitution of 1879 and Section 19 of Article XII of the Constitution of 1921, and the amounts so determined shall be credited to the parish school boards of the parishes in which such townships are situated in proportion to the percentage of the townships lying in each said parishes and amounts so credited shall be treated as loans to the State on which the State shall pay interest at the rate of four per cent (4%) per annum.

"The parish school boards of parishes within which there lies a township or any portion of a township containing a Sixteenth Section or any portion of a Sixteenth Section shall be entitled to a portion of the proceeds derived from the sale of said Sixteenth Section or any portions thereof, including the sale of timber thereon and revenues arising from mineral leases, contracts, royalties and all other revenues arising from said sales, leases and contracts heretofore made or which may hereafter be consummated and said proceeds and revenues shall be credited to the parish school boards in which such townships are situated in proportion to the percentage of the townships lying in each parish and on the funds so credited to the respective parish school boards arising from the sources above mentioned, the State shall pay interest

at the rate of four per cent (4%) per annum so long as said funds remain on deposit in the State Treasury; provided however, that any school board shall have authority to direct by resolution that the State Treasurer shall return any funds on deposit to its credit in the State Treasury or which may accrue to its credit from such Sixteenth Sections, and said parish school boards shall have the right to use the said funds in the acquisition, construction and equipping of public school buildings and other school facilities. (As amended Acts 1948, No. 521, adopted Nov. 2, 1948; Acts 1954, No. 743, adopted Nov. 2, 1954)."